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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 281

L. C. CAMPBELL, ET ALS., *Petitioners,*

v.

BEAVER BAYOU DRAINAGE DISTRICT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now L. C. Campbell, E. H. Polk, R. M. Wise, Riley Sanders, and W. G. Dinning, for themselves and for the benefit of other owners of real estate situated within Beaver Bayou Drainage District, who may desire to obtain the same relief, and respectfully petition this Honorable Court to grant a Writ of Certiorari to review the decision and judgment of the Supreme Court of Arkansas, rendered and entered in this cause on the 25th day of April, 1949, petition for rehearing having been denied on the 23rd day of May, 1949.

Decision and Judgment of the Court Below.

The majority opinion of the court below is yet unreported, and appears at pages 33 to 39 of the record herewith filed.

Nature of Cases and Summary Statement of the Matter Involved.

Beaver Bayou Drainage District was created by Act #370 of the Acts of 1920, of the State of Arkansas. It is a special act enacted at a special session at a time when special acts of the Legislature of the State of Arkansas were given little considertion by the Legislative body.

The conditions created by reason of such hasty and ill-considered legislation as to the future were corrected by the People of Arkansas by amendment Fourteen to the Constitution adopted October 5th, 1926, which prohibits the passage of any local or special acts by the legislature.

For the purpose of correcting the conditions already existing by reason of special and local acts passed before the adoption of the amendment to the Constitution, the legislature passed Act #227 of the Acts of 1927, which requires that all improvement districts theretofore created by special act should be subject, in the operation of their affairs, to the laws and provisions of the general statutes of the State of Arkansas which regulate the manner of operating improvement districts, and fixes the terms and conditions upon which a levy of an assessment may be made against the lands situated in the district. Among others this general law requires that a vacancy upon the board of commissioners shall be filled by the County Court. It also requires that notice be given to the owners of land of the district of the levy of any assessment or proposed levy of assessment against their lands which must be approved by the County Court. It also requires that plans of any proposed improvement be filed with the County Court for the inspection of the land owners. Ark. Sts. 1947 21-533.

Act #227 of the Acts of 1927, was construed by the Supreme Court of Arkansas in the case of *Berry* v. *Cousart Bayou Drainage District,* 181 Ark., 974, to mean that the act applied to all drainage districts created by special act.

In the instant case, the Supreme Court of Arkansas, overrules the Berry case in part, and ruled that Act #227 of the Acts of 1927 did not apply in a case where the district was being operated for maintenance purposes only, as in this case, and held that the original Act #370 of the Acts of 1920 is the one with which the present commissioners of the district are required to comply in the operation of the affairs of the district. That leaves for consideration before this Court the constitutionality of Act #370 of the Acts of 1920.

The question of the constitutionality of the Act was raised in the pleadings of the plaintiff, and specifically in the amendment to the complaint as offending the Fourteenth Amendment to the Constitution. The same question was argued at length in the brief of the appellant in the Supreme Court of Arkansas, and also in the motion for rehearing, and has been relied upon as a ground for relief from the inception of the litigation.

Beaver Bayou Drainage District comprises about 50,000 acres of land in Phillips County, Arkansas. This suit is brought by a number of the large land owners both for themselves, and for the benefit of possibly 1,000 other owners of small tracts of land situated within the District for relief against a condition which they consider intolerable.

The area of the District is comprised of three drainage basins, each of which is serviced by a canal constructed by the District at the time of the making of the original improvement, and each basin is distinct and separate from the other. The several canals discharge their flow into Big Creek at their several points of contact.

The whole bonded indebtedness of the District has long since been paid, and the District has acquired title to some 2,000 acres of land under foreclosure proceeding.

The board of directors are now undertaking to levy assessments upon all the lands situated within the District for the purpose of cleaning out a very small portion of only one of the canals of the District.

The purpose of this litigation is to cancel the levies of assessment which have been undertaken to be made against the lands of the District, which, by reason thereof, have become liens against all the lands within the District.

The land owners of the District, so long as there was a bonded indebtedness outstanding, submitted to the manner of handling the affairs of the district as directed by Act #370 of the Acts of 1920. Now, however, since the bonded indebtedness, and all other indebtedness have been fully paid, they feel that they are deprived of their property rights without due process of law by the manner in which the affairs of the District are now being managed.

They are insisting that the provisions of the Statute vest in the Directors or Commissioners named a power that is arbitrary and unrestrained, and the exercise of the powers given to the administrative body of the commissioners permits an abuse which is not permitted under the due process provisions of the Fourteenth Amendment.

Jurisdiction of the Court.

The jurisdiction of this Court is invoked under and by authority of Act of June 25, 1948, Chapter 646, Public Law 773, 28 U. S. C. A., Section 1257 (c), providing that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari, where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Your petitioners alleged in the amendment to their original complaint that Act #370 of the Acts of 1920 of the State of Arkansas was repugnant to the Fourteenth Amendment to the Constitution of the United States; that the constitutionality of Act #370 of the Acts of 1920

was argued upon appeal to the Supreme Court of the State of Arkansas, both on original hearing and upon motion for rehearing. In its yet unreported decision the Supreme Court on the 25th day of April, 1949, ruled in favor of its constitutionality. Motion for rehearing was overruled on the 23rd day of May, 1949.

Questions Presented.

For their grounds the petitioners state:

1. The Supreme Court of Arkansas erred in refusing to adjudge that Act No. 370 of the Acts of 1920 was unconstitutional and void.

2. The Court erred in holding by inference that Act No. 370 of the Acts of 1920 was a valid enactment of the Legislature of the State of Arkansas.

3. The Court erred in holding that the board of commissioners of Beaver Bayou Drainage District have the right to exercise the powers and discharge the duties of their office as defined, and fixed by the provisions of Act No. 370 of the Acts of 1920.

4. The Court erred in finding that the board of directors of Beaver Bayou Drainage District had a legal right to levy an assessment against the lands situated in the District for the purpose of providing funds for maintenance.

Reasons Relied on for Allowance of the Writ.

Act #370 of the Acts of 1920 is unconstitutional and void. It offends the due process clause of the Fourteenth Amendment to the Constitution in the following respects:

I.

1. It creates a board of directors with power to perpetuate itself in office indefinitely by filling vacancies that may occur with persons to be selected by the remaining members of the board.

2. It authorizes the board of directors to maintain the existing improvements and to provide the funds therefor by levying assessments at will, and without the knowledge or consent and against the wishes of the property owners against the 50,000 acres of land in the District for the purpose of providing funds for maintenance purposes.

3. It has power to borrow an unlimited amount of money for the purposes of maintaining such improvements, and to issue bonds in an unlimited amount for the purpose of providing funds for that purpose, and to create a lien against the 50,000 acres of land in the district for the purpose of securing the repayment of such bonds, which said lien will be superior to the rights of any person except for taxes and for prior assessments.

4. It is required by the provisions of the Act, irrespective of the benefits to accrue to the several tracts of land by reason of the maintenance program, to levy an assessment against all the lands in the district based upon the original assessment levied for the purpose of providing funds for the original construction.

5. It permits the board of directors to use the funds arising from the levy of assessments in such manner as they may see fit and without accounting to the land owners or any court for the manner in which the funds are being used, or the purpose for which they are being applied.

6. It authorizes the board of directors to determine, without right of appeal to the land owners, that such expenditures are for maintenance purposes when in truth such expenditures may be improvements of a nature which it is not authorized to make.

We are insisting that the Act gives to the board of directors an unrestrained and arbitrary power which constitutes a plain abuse and deprives the owners of land in the district of their rights of property without redress of any kind, and for that reason offends the due process clause of the Fourteenth Amendment to the Constitution of the United States.

II.

The Act places in the hands of the board of directors the power and authority arbitrarily and without restraint to levy an assessment against the lands of the district and use the funds for the purpose of maintaining or improving any one of the drainage canals in any one of the three drainage basins, and to empower the said board of directors to collect from the owners of the land of the whole district, and to use the same for the purpose of improving and rebuilding the one canal which drains their own property to the exclusion of any benefits to the owners of land in the two other drainage basins in the district.

As shown by the testimony, the board of directors has the avowed purpose now of using the proceeds from the assessments already levied for the purpose of cleaning out a portion of one canal which serves the one basin in which their lands are situated. Such acts constitute a clear case of discrimination which denies to the other land owners in the district the equal protection that is granted under the Fourteenth Amendment to the Constitution of the United States.

Prayer of Petitioners.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued by this Court directed to the Supreme Court of Arkansas, to the end that the decision and judgment of that court in this cause may be reviewed by this Court as provided by law, and that upon such review the said decision and judgment be reversed.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The essential facts of the case are fully stated in the Petition for Writ of Certiorari, and, in the interest of brevity, are not here repeated.

Specifications of Error to be Urged.

The Supreme Court of Arkansas in its majority opinion in this cause erred:

(1) In refusing to adjudge that Act No. 370 of the Acts of 1920 of the State of Arkansas was unconstitutional and void.

(2) In holding by inference that Act No. 370 of the Acts of 1920 of the State of Arkansas was a valid enactment of the Legislature of the State of Arkansas.

(3) In holding that the board of directors of Beaver Bayou Drainage District have the right to exercise the

powers and discharge the duties of their office as defined and fixed by the provisions of Act No. 370 of the Acts of 1920.

(4) In finding that the board of directors of Beaver Bayou Drainage District had a legal right to levy an assessment against the lands situated in the district for the purpose of providing funds for the contemplated improvements.

Argument.

The petitioners rely upon the following cases as authorities in support of this petition, to-wit: *Norwood* v. *Baker,* 172 U. S. 269; 43 L. Ed. 443; *Myles Salt Co.* v. *Commissioners of Iberia St. Mary's Drainage District,* 239 U. S. 478; 60 L. Ed. 392; *Harmon* v. *Bolley,* 187 Ind., 511; 2 A. L. R. 609; 120 N. E. 33.

Although the constitutionality of the Act #370 of the Acts of 1920 was raised in the original complaint, and specifically in the amendment to the complaint, in the argument in the brief on appeal to the Supreme Court of Arkansas, and on motion for rehearing, that court refused to consider that question. That fact, however, does not deprive the petitioners here of their right to ask for a hearing in this court. *Consolidated Coal Co., of St. Louis* v. *People of the State of Illinois,* 185 U. S. 203; 46 L. Ed. 873.

The Legislature has the authoirty, without offending the Fourteenth Amendment, to fix the boundaries of a district, and to fix the amount of funds that may be raised for the purpose of paying for the proposed improvement, but we do not find judicial authority for permitting the Legislative Body to fix the amount to be paid by the individual land owners as their portion of the cost of the improvement. *John C. Spencer* v. *Caroline L. Merchant,* 125 U. S. 345; 31 L. Ed. 763; *Wagner* v. *Lesser,* 239 U. S. 212; 60 L. Ed. 230.

The fixing of the amount of benefits to be charged against the several tracts of land in the district appears to be a judicial act which should be based upon a report of appraisers appointed for the purpose. *George Hagen* v. *Reclamation District 108,* 111 U. S. 701; 28 L. Ed. 569.

The case of *Harmon* v. *Bolley, supra,* we consider, a very thoughtful and careful review of the decisions of both the State of Indiana and of this Court. The conclusion is reached that the mere fact that the board of commissioners is required to fix the amount of the benefits for maintenance upon the same basis as that fixed for the original construction, offends the due process clause of the Fourteenth Amendment. The conclusion of the Court in that case appears to have been deliberately and carefully reached after a very thorough consideration of other cases in point.

The levy of the assessment by the board of directors in the instant case is both palpably arbitrary, and a plain abuse. It offends the due process clause, and is void. *Houck* v. *Little River Drainage District,* 239 U. S. 254; 60 L. Ed. 266.

If the effect of the levy of assessments is plainly discriminatory as in the case at bar, the case of *Myles Salt Co.* v. *Commissioners of Iberia St. Mary's Drainage District, supra,* is authority for the position that such act on the part of the board offends the equal protection clause of the Constitution, although the Act itself may be fair on its face.

It will be noted that the board of directors, under the powers of the Act under consideration, has authority to levy assessments against the property in the district at their will, in an amount that they may decide to be necessary, and as long as they deem necessary, and no longer, and to make additional improvements consisting of lateral ditches without the consent or approval of the land owners in the district, and without being required to account to any person, or any organization for the use of the funds coming into their hands as directors, all to be done without

notice to land owners, and against their wishes. This is held to be in violation of the Fourteenth Amendment in the case of *Norwood* v. *Baker, supra.*

The board of directors is authorized, under the Act, to borrow an unlimited amount of money for any purpose they may desire to use it, and to issue and deliver bonds as evidence of such indebtedness, which said bonds constitute a first lien against all the lands in the district, excepting former levies of assessments and State and County taxes. All this is done by the board of directors without notice, without knowledge on the part of the land owners, and against their wishes.

We believe that the case of *Norwood* v. *Baker, supra,* is authority for the fact that such conduct and such powers are arbitrary and a clear abuse.

In total disregard of the benefits to be received, the board of directors has undertaken to levy against the lands in the district assessments of benefits aggregating $12,000.00, for the year 1948, and this assessment has been based upon the assessment of benefits levied for the purpose of raising funds for the original improvement as required by the Statute. It is the avowed purpose of the board of directors to use these funds for the purpose of restoring to a useful condition a part of one canal which drains one of the drainage basins in the district, and this happens to be the basin in which their lands are situated. It will require from six to ten years for enough money to accumulate from the assessments as levied for the year 1948 to provide funds for restoring the one drainage canal to a condition of usefulness. During that period the owners of land in the two other drainage basins will be contributing their money without even the hope of receiving any benefit.

The rule applicable to both the due process provision and the equal protection provision of the Fourteenth Amendment has been stated in this court in the case of *Memphis and Charleston Railway Company* v. *C. L. Pace,* 282 U. S.

241; 51 S. Ct. 108; 75 L. Ed. 315; 72 A. L. R. 1096, as follows:

> "But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause (Houck v. Little River Drainage Dist. U. S., 254, 262, 265, 60 L. ed. 266, 273, 274, 36 S. Ct. 58, supra; Valley Farms Co. v. Westchester County, 261 U. S. 155, 67 L. Ed. 585, 43 S. Ct. 261, supra); and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause (Gast Realty & Invest. Co., v. Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523, 36 S. Ct. 254; Kansas City S. R. Co. v. Road Improv. Dist., 256 U. S. 658, 65 L. ed. 1151, 41 S. Ct. 604; Thomas v. Kansas City S. R. Co., 261 U. S. 481, 67 L. ed. 758, 43 S. Ct. 440; Road Improv. Dist. v. Missouri P. R. Co., 274 U. S. 188, 71 L. ed. 992, 47 S. Ct. 563)."

We feel that the Supreme Court of Arkansas has committed error in refusing to pass upon and adjudge to be unconstitutional Act No. 370 of the Acts of 1920.

Conclusion.

It is, therefore, apparent that the decision of the Supreme Court of Arkansas holding that the Act No. 370 of the Acts of 1920 of the State of Arkansas was not repugnant to the Fourteenth Amendment to the Constitution of the United States is in direct conflict with the decisions of this Court.

Your petitioners, therefore, pray that this Court issue its Writ of Certiorari herein and that upon final hearing the judgment rendered herein by the Supreme Court of Arkansas be reversed.

Respectfully submitted,

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